DATE ISSUED: May 18, 1999

CASE NO.: 1999-SDW-00002

In the Matter of

JUDITH C. KIRMAN,
Complainant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

Appearances:

Jeffrey G. Letts, Esq.,
For the Complainant

Jeffrey Cox, Esq.,
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

PROCEDURAL HISTORY

This proceeding arose under the employee protection provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610, the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367, the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971, the Clean Air Act (CAA), 42 U.S.C. § 7622 (1982), the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 *et seq*, the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and the implementing regulations at 29 C.F.R. Part 24.

Complainant, Judith C. Kirman, filed a complaint with the Secretary of Labor, on April 2, 1998 alleging that she was a protected employee engaged in a protected activity within the scope

of the above Acts, and was reassigned by the Respondent, the United States Environmental Protection Agency (hereinafter "EPA") as a result of this activity.

A compliance investigation was conducted by the Calumet City, Illinois, Occupational Safety and Health Administration (OSHA), U.S. Department of Labor. On December 8, 1998, OSHA announced its determination that Ms. Kirman was a protected employee engaging in a protected activity within the scope of CERCLA. OSHA further found that the mandatory transfer of the complainant was in retaliation for Ms. Kirman's actions and in violation of CERCLA. The EPA sought a hearing before an administrative law judge.

I was assigned the matter on December 23, 1998 and issued a Notice of Hearing on December 30, 1998. The hearing, scheduled for March 2, 1999, was continued and scheduled for May 25, 1999.

TERMS OF AGREEMENT

On May 6, 1999, I received a copy of a completed Settlement Agreement from the parties. This Agreement was dated April 30, 1999. The agreement provides that upon the issuance of an order dismissing the complaint with prejudice, Respondent will provide Ms. Kirman the following: a position in the Resources Management Division as a Management Analyst effective May 23, 1999; a pay increase effective May 23, 1999, without retroactive pay; and a specified sum of money to be mailed no later than June 22, 1999. Respondent further agreed to pay "reasonable and documented" attorneys' fees directly to the complainant's counsel.

The complainant further agrees to a "general release" of all claims relating to her employment with the EPA up until the date of the Settlement Agreement. The parties agree to keep the matter of the agreement confidential.

REVIEW OF AGREEMENT

The agreement must be reviewed to determine whether the terms are a fair, adequate, and reasonable settlement of the complainant's allegations. *See, e.g., Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, November 2, 1987, slip opin. at 2 and *Bunn v. MMR/Foley*, 89-ERA-5 (Sec'y Aug. 2, 1989). Moreover, review and approval of the settlement is limited to matters arising under the employee protection provisions under the jurisdiction of the Department of Labor. *Mills v. Arizona Public Service Co.*, 92-ERA-13 (Sec'y Jan. 23, 1992); *Anderson v. Kaiser Engineers Hanford Co.*, 94-ERA-14 (Sec'y Oct. 21, 1994); and, *Poulos, supra.*

The parties asked that the agreement be treated as "confidential." In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ALJ March 11, 1997), Judge Kaplan invited the Administrative Review Board to address the apparent conflict between the Department of Labor's FOIA responsibilities and the precedents discussing the importance of public disclosure of the true

dollar amounts of whistleblower settlements. *See, i.e., Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). Judge Kaplan pointed out that the regulations and the Secretary's policy appear to allow parties to so limit public access. *See, Klock v. Tennessee Valley Authority*, 95-ERA-20 (ARB, May 1, 1996); *Ezell v. Tennessee Valley Authority*, 95-ERA-33 slip opinion at 2 n. 3 (ARB, Sept. 19, 1996).[1] Thus, the agreement itself is not appended and is forwarded separately. It is marked "PREDISCLOSURE NOTIFICATION MATERIALS."

I find the terms of the "confidentiality" provision do not violate public policy in that they do not prohibit the Complainant from communicating with appropriate government agencies. *See, e.g., Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec'y June 19, 1995); *Brown v. Holmes & Narver*, 90-ERA-26 (Sec'y May 11, 1994); The *Connecticut Light & Power Co. v. Secretary of United States Dep't of Labor*, No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996); and, *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Final Order Approving Settlement, December 18, 1990, slip opin. at 2, where the Secretary honored the parties' confidentiality agreement except where disclosure may be required by law. This is true because the Paragraph Six of the Agreement specifically provides that the complainant will have the same rights and opportunities as afforded all federal employees.

The provision providing for payment of "reasonable and documented" attorneys' fees by the respondent is also acceptable. In *Guity v. Tennessee Valley Authority*, 90-ERA-10 (ALJ Aug. 15, 1996), the Administrative Law Judge approved a settlement where the amount of the attorney's fees was not disclosed. Furthermore, the settlement in *Guity* provided that the respondent was released from paying the attorney's fees. However, on appeal to the Board, it was noted that in order for a settlement to be approved the actual amount of money, irrespective of attorney's fees, to be paid to the complainant must be known by the court. In the case at hand, the respondent is responsible for attorney's fees and the actual amount of money to be paid to the complainant is clear.

The "release" provision, paragraph 1, is also acceptable because it only limits the right to

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[1] In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB Mar. 27, 1997), however, the ARB declined the ALJ's suggestion *sub silentio*. Rather, the ARB employed the following standard boilerplate language in approving the settlement:

> The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.

Slip op. at 2.

sue in the future on claims or causes of action that the parties may have as of the date of the agreement. *Armijo v. Wackenhut Services, Inc.*, 94-ERA-7 (Sec'y Aug. 22, 1994); *Saporito v. Arizona Public Service Co.*, 92-ERA-30, 93-ERA-26 and 93-ERA-43 (Sec'y Mar. 21, 1994); and, *McCoy v. Utah Power*, 94-CAA-1 and 6 (Sec'y Aug. 1, 1994).

The fact that the agreement does not contain the provisions found in 29 C.F.R. § 18.9(b) does not invalidate it as those provisions apply to consent findings not settlements. *Simmons v. Arizona Public Service Co.*, 90-ERA-6 (Sec'y Sept. 7, 1994).

There are no further aspects of the agreement which need be discussed for purposes of this recommendation.

I have no basis on which to recommend that the amount agreed upon is not fair, adequate and reasonable. Nor do I have reason to believe other provisions in the agreement are inappropriate.

ORDER

It is hereby RECOMMENDED that the Secretary of Labor find the terms of the agreement fair, adequate and reasonable, and therefore approve the Settlement Agreement. It is further RECOMMENDED that the complaint be dismissed with prejudice.

SO ORDERED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:SMG:dmr

NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).